

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHARRON POE)	
Claimant)	
)	
VS.)	
)	
SHAWNEE MISSION MEDICAL CENTER)	
Respondent)	Docket Nos. 1,043,346
)	1,044,967
)	
AND)	
)	
ADVENTIST HEALTHY SYSTEM SUNBELT)	
HEALTHCARE CORP.)	
Insurance Carrier)	

ORDER

Claimant requested review of the September 23, 2010 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on December 17, 2010. E. Lee Kinch was assigned as a pro tem in this matter.¹

APPEARANCES

Michael J. Joshi, of Lenexa, Kansas, appeared for the claimant. Gary R. Terrill, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This Award addresses two separate accidents which were consolidated for purposes of trial and appeal. The ALJ assigned to claimant a 10 percent permanent partial

¹ This appointment was made due to the retirement of Board Member, Carol Foreman.

impairment to the right leg (at the level of the knee)² for injuries sustained in the first accident (Docket No. 1,043,346). He then assigned a 15 percent permanent partial impairment to the left leg for injuries sustained in the second accident (Docket No. 1,044,967). These impairment ratings represent the ALJ's assessment of claimant's impairment due solely to the accidents at issue and specifically excludes any aggravation of claimant's preexisting arthritic condition in her knees as he concluded that "there is no indication in the record that claimant's pre-existing condition was aggravated, accelerated, or intensified, as a reasonable medical certainty."³

According to claimant's brief and statements made at oral arguments, the primary purpose of this appeal is to address the ALJ's factual conclusion as to the aggravation of claimant's bilateral arthritic condition as a result of each of her injuries.⁴ Claimant contends that the evidence establishes that it is more probably true than not that she sustained an aggravation, acceleration and/or intensification of her arthritis as a result of each of her injuries. And whether the Board decides claimant's ultimate impairment should be increased over that awarded by the ALJ, (which claimant asks the Board to do) claimant should, nevertheless, be entitled to future medical benefits in the event that she requires further treatment to either of her knees for each of her work-related injuries. Thus, the claimant asks the Board to modify the ALJ's Award to reflect, at a minimum, the contention that claimant's arthritic condition was aggravated by her injuries and find her entitled to future medical benefits for both lower extremities as well as an increased impairment, consistent with the bilateral 25 percent impairment assessed by Dr. Hopkins.

Respondent contends that the ALJ's Award should be affirmed. Respondent agrees with the ALJ's evaluation of the medical testimony. Respondent believes the evidence fails to establish that claimant's preexisting arthritic condition has been aggravated, accelerated or intensified as a result of either of these two accidents. Moreover, respondent asserts that claimant's appeal appears to be nothing more than a request for the Board to render an advisory opinion as to claimant's entitlement to knee replacement procedures which have been suggested might well be necessary at some point in the future.

The only issue to be decided by this appeal is the nature and extent of claimant's impairment in each docketed claim. In both cases only scheduled injuries are alleged and

² All ratings referenced in this Order are to the lower extremity at the level of the knee, based upon the 4th edition of the *Guides*. American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ ALJ Award (Sept. 23, 2010) at 7.

⁴ Initially claimant's entitlement to temporary total disability benefits was an issue in this appeal but at oral argument, that issue was waived.

the ratings are to the lower extremity, at the level of the leg. Implicit in this decision is the question of whether and to what extent claimant's permanent impairment includes any aggravation, acceleration or intensification of claimant's preexisting arthritic condition in her knees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

These claims involve two separate and compensable injuries to claimant's knees. The first injury occurred on October 27, 2007 and involved claimant's right knee. The second accident occurred April 28, 2008 and involved claimant's left knee.

It must first be noted that claimant suffered an injury to her *right* knee in 2006. That earlier injury happened away from work and was diagnosed as a meniscus tear which required surgery. She did, however, return to work performing her normal work duties, but went on to sustain a compensable injury to her right knee on October 27, 2007.⁵ After treatment from the 2007 injury, which included surgery, claimant returned to work and unfortunately, sustained another compensable injury on April 28, 2008, this time to her left knee.⁶ Again, she was treated surgically and returned to work, this time at light duty. But according to claimant, she had difficulty performing this light duty, mostly due to complaints associated with her right knee.

Claimant ultimately retired from working in September 2008 as she testified that she has limited use of her right knee and had difficulty continuing to work. She indicated that she cannot walk and suffers from "horrid pain" in the right knee.⁷ Claimant is unable to take pain medications and limits herself to over-the-counter pain relievers. Both of her knees continue to swell, although the right knee appears to cause claimant far more problems, both with pain and swelling.

Three physicians have spoken as to claimant's diagnosis, treatment and ultimate impairment. Dr. Mark Rasmussen first was called upon to treat claimant's left knee and then took over her treatment to the right. He performed surgery to the left knee, trimming the medial meniscus due to a large tear and smoothing off the rough cartilage on the back of her knee cap and on the inside of the medial femoral condyle. He provided only

⁵ This accident forms the basis for Docket No. 1,043,346.

⁶ This accident forms the basis for Docket No. 1,044,967.

⁷ R.H. Trans. (July 15, 2010) at 10.

conservative treatment to the right knee as he did not think any further surgery at this point would help improve her condition.

Dr. Rasmussen confirmed that claimant suffered from her arthritic degenerative condition in both knees before her two compensable injuries at issue in this case.⁸ And after taking into consideration the treatment he provided, her diagnoses and a review of her earlier medical records associated with her earlier knee injury, he went on to assign a 4 percent impairment to claimant's right lower extremity and 16 percent to the left lower extremity. Dr. Rasmussen testified that the pain claimant continues to suffer from is presumably from the arthritis she has in both knees.

Dr. Rasmussen acknowledged that claimant's inability to function and the pain in her knees is primarily related to the arthritis in her knees. And while he testified that the meniscus injury is not the *cause* of the claimant's arthritis he indicated that it can contribute to the arthritis.⁹ And that a blow to the knee could aggravate the underlying arthritis.¹⁰

At her counsel's request, Dr. William O. Hopkins evaluated claimant's condition and offered his opinion as to her diagnosis and impairment. He testified that based on his examination, on February 16, 2009, he believed that claimant had bilateral arthritis, diminished joint space in both knees and damage to the medial site within both knees. During the examination, he specifically noted her waddling gait as well as the swelling in both knees.¹¹ He went on to rate her impairment at 25 percent to each knee, primarily based upon the joint surface damage and the loss of space within each knee.¹² Dr. Hopkins also testified that claimant may have suffered a 10 percent impairment to her right knee for her 2006 injury, but that it was difficult to substantiate that impairment if claimant demonstrated no pain complaints, a lack of normal motion or normal level of physical activity.¹³

Dr. Edward J. Prostic was asked (by the ALJ) to perform an independent medical examination and did so on July 27, 2009. According to his report and testimony, he found claimant sustained a partial medial menisectomy and a chondroplasty medial femoral condyle of the right knee which resulted in a 10 percent impairment to the right knee (over

⁸ Rasmussen Depo. at 9.

⁹ *Id.* at 18-19.

¹⁰ *Id.*

¹¹ Hopkins Depo. at 10.

¹² *Id.* at 27-28; Ex. 2 at 11 (Dr. Hopkins Feb. 16, 2009 report at 8).

¹³ *Id.* at 30.

and above her preexisting impairment in the right knee). He diagnosed a partial medial and partial lateral menisectomy and a chronoplasty of the medial femoral chondyle and patella in the left knee which he rated at 14 percent. Thus, he did not use the anatomic model of rating impairment as Dr. Hopkins had, instead using the diagnostic injury model. His report goes on to indicate that claimant has "significant pain about the right knee" which he believed was "highly suspicious for progression of osteoarthritis."¹⁴

After considering this testimony and the entire contents of the record, the ALJ assigned a 10 percent to the right knee (in Docket No. 1,043,346) and a 15 percent to the left knee (in Docket No. 1,044,967). With respect to the right knee, the ALJ explained his finding as follows:

In reviewing the testimony of these three physicians, the Administrative Law Judge notes that Dr[.] Prostic saw claimant July 27, 2009, some 5 months after being seeing [sic] by Dr. Hopkins. Further, Dr[.] Prostic was appointed as an independent medical examiner, as acquiesced by the parties herein, not hired by either party for a rating. Further, there is no indication in the record, other then [sic] a statement by Dr. Rasmussen that claimant's pre-existing condition could have been aggravated by her accidental injuries, that claimant did aggravate, accelerate, or intensify her pre-existing underlying condition. Hence, there is no indication in the record that claimant's pre-existing condition was aggravated, accelerated or intensified, as a reasonable medical certainty.¹⁵

And as it relates to the left knee, the ALJ stated:

There is no evidence presented by claimant to indicate that the injury of April 28, 2008 did within a reasonable degree of medical certainty aggravate, accelerate, or intensify her underlying progressive disease process. Accordingly, the claimant is limited to the functional impairment rating as a direct result of her occupational injury of April 28, 2008. . . In reviewing the testimony presented, again, Dr. Prostic was the last to see claimant's physical condition his examination being in July 2009, approximately 5 months subsequent to that of Dr. Hopkins. Further, it appears that Dr. Hopkins["] rating includes claimant's progressive disease process. . . Dr. Hopkins offered no opinion regarding any aggravating, intensifying or accelerating effect claimant's occupational injury may have had on the pre-existing status of her knee. Accordingly, claimant is limited to the functional impairment to the leg as determined by the direct result of her accident."¹⁶

¹⁴ Prostic Depo., Ex, 1 at 4.

¹⁵ ALJ Award (Sept. 23, 2010) at 6-7.

¹⁶ *Id.* at 8.

The ALJ then goes on to average the two remaining impairments and award a 15 percent to the left knee.

The Board has considered the record as a whole as well as the ALJ's findings and reasoning and concludes the Award should be modified in part.

Based upon claimant's argument to the Board, there is no significant dispute as to the functional impairment assessments made by the ALJ. Rather, the claimant's primary complaint is that the ALJ failed to find that claimant established her evidentiary burden of showing that her pre-existing arthritic condition in both knees was aggravated, accelerated or intensified by her work-related injuries. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹⁷ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹⁸

As it relates to Docket No. 1,043,346, the Board disagrees with the ALJ's finding that there was "no" indication or evidence in the record that claimant's arthritic condition was aggravated by her injury. Even the ALJ's Award acknowledged that Dr. Rasmussen testified that claimant's pre-existing condition *could have* been worsened by her work-related injury. Moreover, both Dr. Hopkins and Dr. Prostic seem to suggest that claimant's condition in her right knee was aggravated by her injury.

On or about October 27, 2007, Sharron K. Poe sustained injury to her right knee during the course of her employment. She required partial medial meniscectomy and chondroplasty of the medial femoral condyle. She continues to have significant symptoms of patellefemoral dysfunction. She sustained 10% permanent partial impairment to the lower extremity over and above pre-existing impairment that follows her previous partial medial and partial later meniscectomy by Dr. Lane. The significant pain about the right knee is highly suspicious for progression of osteoarthritis. If possible, the patient's right knee claim should be settled with open medical benefits in case she needs total knee replacement arthroplasty.¹⁹

And the facts bear this out. Claimant returned to work after her 2006 injury, working without incident until her first work-related injury. And after her October 27, 2007 injury,

¹⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

¹⁹ Prostic Depo., Ex. 2 at 3 (Dr. Prostic's July 27, 2009 report).

claimant has continually suffered from pain and swelling in that extremity, more so as time went on. No further surgery is recommended for that knee and she must now wear a brace on her right knee. Although it is true that no physician expressly testified as to the aggravation of claimant's pre-existing arthritic condition, the Board is persuaded both by claimant's testimony and that of the physicians that her arthritis was, in fact, aggravated and/or accelerated in her right knee as a result of her October 27, 2007 injury. Thus, the Board finds the ALJ's conclusion that claimant failed to establish that her injury aggravated, accelerated or intensified her pre-existing arthritic condition should be reversed as it relates to her right knee only, while the remainder of the ALJ's findings as to permanency and medical treatment is affirmed.

As for Docket No. 1,044,967 and claimant's left knee injury, the Board affirms the ALJ's Award as it concludes the record supports those factual and legal findings made in Docket No. 1,044,967.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Awards of Administrative Law Judge Steven J. Howard dated September 23, 2010, are affirmed in part and modified in part as follows:

Docket No. 1,043,346

The Board finds that in addition to the 10 percent functional impairment awarded by the ALJ, claimant's pre-existing arthritic condition was aggravated, accelerated and/or intensified as a result of the October 27, 2007 accidental injury. The balance of the Award is affirmed.

Docket No. 1,044,967

The findings and conclusions contained within the ALJ's Award in regard to this docket number are hereby affirmed in their entirety.

IT IS SO ORDERED.

Dated this _____ day of January 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge